No. 14596

In the
United States Court of Appeals
For the Ninth Circuit

JERRY LEE REESE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Petition for Rehearing

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Petition for Rehearing

Comes now the appellant, by his attorney, and files this his Petition for Rehearing of the Judgment entered by the Court on August 22, 1955, affirming the judgment of the court below.

Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to certain features of the decision wherein he believes the court may be convinced its opinion is incorrect.

I.

The opinion does not deal with the important point urged by appellant that he had been improperly denied a reopening of his classification. *None* of the cases

cited by him on this point are even mentioned. Particularly overlooked were the very recent Court of Appeals cases cited in oral argument and presented subsequently, at the Court's suggestion, in a typewritten memorandum:

> *United States vs. Henderson*, 223 F. 2d 421 (7 Cir. June 9, 1955);
> *United States vs. Ransom,* 223 F. 2d 15 (7 Cir., June 16, 1955);

and the older case of

> *Mintz vs. Howlett,* 207 F. 2d 759, 762 (2d Cir., October 27, 1953).

The only place in the opinion where there is reference to this point is on page 12 of the slip opinion, wherein is found:

> "He further asserts 'even if the local board is unconvinced, it should so handle the situation [reopen] so that the registrant has an opportunity for an appellate determination,' hence 'appellant was denied due process in both of the above instances.' "

The opinion then closed *without the slightest discussion of this subject.* Appellant respectfully submits this must have been an oversight. Appellant believes his point is good and is supported by the cases above cited.

II.

The opinion deals at length (and almost solely) with appellant's complaint that the personal appearance hearing was unfair; yet the opinion does not deal squarely with an important sub-portion of this complaint, namely, that his *oral* presentation was unfairly abridged. The Opening Brief, at page 42, cited §1624.2 of the regulations as giving a registrant the right to discuss his file, to argue his evidence and to point out and explain. A written presentation is no adequate substitute for such oral presentation rights. The Opening Brief cited the appellate decisions of *Davis, Bejelis, Zieber and Stiles.* The opinion does not even mention them. These "oral" rights were given by the regulation and the curtailment here to 3 minutes was an abuse of discretion.

III.

The opinion holds that "the mere asking of this question [divinity school] by the local board member (without more)" does not bring the facts of the case within the rule used in *Kezmes.* Appellant believes there was more to the situation than the mere asking of the question; that the following should be recalled concerning what occurred at the personal appearance hearing before the local board:

1. *All* the questions were asked by *the chairman* of the board;
2. All of the five minute hearing was devoted to the *ministry claim* of appellant;

3. The only subject he was questioned on was whether "he had attended or graduated from a recognized Theological Seminary or Bible Institute." Although the summary of the hearing [Ex. 26] shows only this one particular question on this subject, the sole subject of the questioning, it is appellant's undisputed testimony that they asked him several questions. [R. 36]

It is, therefore, submitted that the record discloses more than the simple asking of a question; that we have here a *use* of an illegal basis; that the *only* basis disclosed is the illegal one.

Wherefore, upon the foregoing grounds, and for other reasons appearing in appellant's Brief, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this petition.

REQUEST FOR AMENDMENT

In the event a rehearing is not granted it is respectfully requested that the wording of two portions of the opinion be changed.

The opinion contains the following statements that appellant suggests should be amended:

1. On page 3 of the slip opinion it is stated:

"As to his primary contention above noted, he pinpoints his argument by relying on a recent decision which he assures us is 'squarely in point' on this issue—*United States vs. Kezmes,* 125 F. Supp. 300."

Appellant's Closing Brief, page 6, reads:

"At least one very recent reported decision has squarely met this issue. In *United States vs. Kezmes,* 125 F. Supp. 300, the Court held that the denial of a minister's classification because the defendant had no college or theological training was wrong. Also helpful to our factual situation is the statement of the Court on page 302: 'Again, unfortunately, the local board gave voice to sentiments which *may* have clouded their thinking and been the motivating factors in their final conclusion, i.e., to refuse the IV-D classification. . . .' [underscoring supplied]. It is to be noted further in the *Kezmes* case that there are two important parallels to the instant case. . . ."

Appellant submits:

a. He did not assure the Court *Kezmes* is "squarely *in point* on this issue"; he assured the Court that *Kezmes* "has squarely *met this issue.*"
b. He was using *Kezmes* as helpful reasoning;
c. He was pointing out some *parallels* in *Kezmes.*
d. The brief did not attempt to overstate the value of *Kezmes;* appellant frankly argued in his Closing Brief (page 6):

"It is true it is not clear that the lack of attendance at a Theological Seminary or a Bible Institute was the sole or determinative basis for the board's rejection of his claim. The fact, however, that it was used at all taints the decision. There are a number of cases from other jurisdictions that also support this reasoning, none of which were cited in the Opening Brief."

2. On page 13 of the slip opinion it is stated:

"Appellant does not indicate in his briefs any reason for departure from the general doctrine announced in our *Niles'* decision nor does he even refer to that opinion."

Appellant respectfully reminds the Court:

a. Appellant's Opening Brief was written *before* the *Niles* decision;
b. Appellant's Closing Brief was on only two (other) points;
c. During oral argument, in response to the invitation of Judge Bone to comment on the Constitu-

tional attacks made in the Opening Brief, counsel replied that they were abandoned because "You have taken care of them in *Niles.*"

Appellant requests the Court to amend its opinion to conform to the above.

Counsel further represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

J. B. TIETZ
Attorney for Appellant.